

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

3 SHENZHEN ROOT TECHNOLOGY )  
4 CO., LTD., et al., )  
5 Plaintiffs, )  
6 v. )  
7 CHIARO TECHNOLOGY LTD., )  
8 Defendant. )  
9 \_\_\_\_\_ )  
10 CHIARO TECHNOLOGY LTD., )  
11 Counterclaim Plaintiff, )  
12 v. )  
13 SHENZHEN ROOT TECHNOLOGY )  
14 CO., LTD., et al., )  
14 Counterclaim Defendants. )

VERBATIM REPORT OF PROCEEDINGS  
BEFORE THE HONORABLE KYMBERLY K. EVANSON  
UNITED STATES DISTRICT JUDGE

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2 APPEARANCES:  
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1 MARCH 22, 2024 - AFTERNOON SESSION

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3 THE DEPUTY CLERK: Please come to attention. The  
4 United States District Court for the Western District of  
5 Washington is now in session, the Honorable Judge Kymberly K.  
6 Evanson presiding.

7 Now calling case C23-0631, assigned to this Court,  
8 Shenzhen Root Technology Co. versus Chiaro Technology  
9 Limited.

10 May I have appearances, please?

11 MR. WALTERS: Good afternoon, Your Honor. Mark  
12 Walters for the defendant, and I'm local counsel here, and  
13 Nirav Desai will handle the argument for defendants.

14 MR. DESAI: Good morning, Your Honor. This is Nirav  
15 Desai from Sterne, Kessler, Goldstein & Fox on behalf of  
16 defendants, as Mark said, and with me is my associate, Zach  
17 Jacobs.

18 THE COURT: Great. Good afternoon, Counsel.

19 MR. JACOBS: Good afternoon, Your Honor.

20 MR. ROLLER: Good afternoon, Your Honor. Jeremy  
21 Roller on behalf of the Momcozy parties, and with me is Yang  
22 Qianwu, who is in China. It's about 5:30 in the morning for  
23 him. I think I will be doing most of the speaking today on  
24 our behalf, but with the Court's indulgence, there may be  
25 some clarification that Mr. Qianwu can provide.

1                   THE COURT: That's fine.

2                   All right. Everyone, thank you so much, and thank you in  
3 particular to Mr. Qianwu for being here so early in the  
4 morning and participating in the Court's discovery procedure  
5 for discovery disputes.

6                   So my hope is that we can have a conversation today,  
7 identify the issues that are actually in dispute, and save  
8 the parties and the Court time and resources as we help you  
9 move your case forward.

10                  I understand that we're here on a dispute with respect to  
11 the drafting of your ESI order and whether the Momcozy  
12 parties, both plaintiffs and defendants, should be required  
13 to search the personal devices of certain executives with  
14 respect to the WeChat messages.

15                  So I will go ahead and hear from the parties. I do have  
16 some questions. I think it probably makes sense for counsel  
17 for Elvie to go first since you're the proponent of the  
18 information, you're seeking the information, so I will go  
19 ahead and hear from you and then hear from you, Mr. Roller,  
20 with respect to the objection to providing that information.

21                  MR. DESAI: Sure, absolutely, Your Honor. Thank you.  
22 Again, Nirav Desai on behalf of Defendant and Counterclaim  
23 Plaintiff Elvie.

24                  The parties have been negotiating an ESI stipulation based  
25 on the Court's model, and in the context of that discussion,

1 we inquired with Momcozy whether they conduct business  
2 communications over WeChat. I don't know if Your Honor is  
3 familiar with WeChat. It's basically an app that does  
4 messaging as well as social media and even payments, mobile  
5 payments, and it's used pervasively in China.

6 It's also very commonly used as a, sort of, primary  
7 communication for -- communication channel for business in  
8 China, and that appears to be the case here in discussing the  
9 issue with Momcozy's counsel. Momcozy counsel represented to  
10 us that about 30 percent of communication -- of Momcozy's  
11 business communication occurs over WeChat.

12 So, when we indicated that, in our view, that meant that  
13 there's very likely to be relevant information in Momcozy  
14 payments or in WeChat messages, Momcozy did, then, sort of  
15 walk back that 30 percent number, but without really directly  
16 addressing what the actual usage is.

17 In addition to that 30 percent figure, Elvie also  
18 identified that at least one Momcozy entity has a  
19 publicly-facing WeChat channel that they use to solicit  
20 customer feedback and customer inquiries, and so, in our  
21 view, Momcozy's WeChat messages are very likely to contain  
22 information relevant to this case.

23 In the discovery dispute letter, Your Honor probably saw  
24 that Momcozy references specifically the willful infringement  
25 allegation that we've raised, and certainly, you know, the

1 contact between the parties in this case goes back to  
2 June 2022, when we first raised in our cease-and-desist  
3 letter our allegation of potential infringement. So, yes, we  
4 think that there's likely to be communications over WeChat  
5 related to the local infringement issue, but that's just one,  
6 I think, claim in this case that is likely to be important  
7 here. There's probably communications related to  
8 infringement, to copying, to sales and marketing, to damages,  
9 given the, sort of, 30 percent figure and the fact that they  
10 use WeChat as a publicly-facing channel. There's --

11 THE COURT: So -- oh, go ahead. Please continue.

12 MR. DESAI: I was just going to say that, in  
13 response, there have been some -- in the letter and in our  
14 discussions, there have been some, sort of, vague allusions  
15 to concerns about Chinese privacy laws or personal  
16 information. We've been very up-front that we're not looking  
17 for personal information here. We're happy to work as the  
18 model ESI order suggests. We're happy to work with Momcozy  
19 to use targeted search terms or kind of narrow our focus on  
20 particular Momcozy execs or employees, but Momcozy has kind  
21 of drawn a pretty hard line in the sand that they just won't  
22 turn over anything related to WeChat, whether or not there  
23 is, you know, relevant information, and so that kind of led  
24 us to raise this issue with the Court to try to get some --

25 THE COURT: Counsel, you're frozen on my end.

1 MR. DESAI: Can you hear me?

2 THE COURT: I'm not sure if this is our internet or  
3 yours.

4 THE DEPUTY CLERK: Judge, you're frozen.

5 MR. DESAI: It sounds like we can all hear each  
6 other.

7 THE DEPUTY CLERK: Give us one second, guys.

8 MR. DESAI: Are we back?

9 THE COURT: Yes. I'm not sure what exactly happened  
10 there, but Mr. Desai froze for a moment, and then I got  
11 kicked out. So I'm not sure what happened on your end, but  
12 we're back on.

13 Okay. Mr. Desai, I'm sorry for the interruption. Please  
14 go ahead. You were just discussing identifying the key  
15 executives.

16 MR. DESAI: Yes. So, as I was just saying -- and  
17 maybe that's my cue to wind it up -- but I was just saying  
18 we're willing to work with Momcozy to use targeted search  
19 terms to identify key execs to make sure that we're not  
20 getting personal information. We're not looking for dinner  
21 plans or anything like that. We just want messages that are  
22 relevant to infringement, relevant to Elvie, relevant to our  
23 patents, things of that nature, and we're absolutely willing  
24 to work with them on that. So maybe I'll leave it there and  
25 take any questions.

1                   THE COURT: Sure. So are you proposing that the key  
2 executives at Momcozy, that they search their own accounts  
3 and provide information or that they make those accounts or  
4 devices accessible to a third-party vendor and run search  
5 terms? I've seen multiple approaches in the case law, so  
6 what proposal, practically speaking, are we talking about  
7 here?

8                   MR. DESAI: I think our proposal would be that WeChat  
9 messages should be treated like any other kind of  
10 electronically-stored information. So, you know, however  
11 emails are being collected and electronic documents are  
12 collected, then WeChat would be collected in that way too.

13                  THE COURT: Is the argument that the WeChat messages  
14 are personal accounts, so they're not in the custody and  
15 control of Momcozy? Is that the argument?

16                  MR. DESAI: That is one of the responsive arguments,  
17 and certainly, you know, that's not an issue that's unique to  
18 WeChat. You know, courts wrestle with that with U.S.-based  
19 text-messaging platforms.

20                  I think the key difference here is that we know that  
21 WeChat is being used for business communications, and even  
22 when, in the normal context, if you're using your text -- you  
23 are using your phone to text business communications, that  
24 pulls those communications into the purview of discovery.  
25 And that's, in fact, why a lot of companies have policies

1 saying don't use your personal devices, use company channels  
2 to conduct business communications.

3 In this case, it seems like -- and it's not something  
4 that's unique to Momcozy -- it seems like it's something  
5 that's actually very common among companies located in China,  
6 is that WeChat is just one of the kinds of -- one of the  
7 forms of business communication tools that Momcozy has used.

8 THE COURT: Sure. And what's your response to  
9 Momcozy that, you know, if they have to pull out these WeChat  
10 messages, then Elvie has to provide its Slack channel search  
11 itself.

12 MR. DESAI: Sure. So our use of -- so, first of all,  
13 we have not drawn a hard line in the sand saying we're not  
14 willing to do that, but our Slack communication is used quite  
15 differently. It's not used for external communication the  
16 way that WeChat apparently is. A lot of what would be in  
17 Slack would be duplicative of what is in email or  
18 electronically-stored data, at least with respect to material  
19 that is relevant to this case.

20 In particular, Momcozy has raised their interference with  
21 business practices claim. You know, it's far less likely  
22 that there's going to be anything sort of unique in our Slack  
23 messaging system, but that said, we are absolutely willing to  
24 have that conversation and talk about a narrow way of  
25 collecting from Slack as well, you know, if that makes sense.

1                   THE COURT: All right. Thank you.

2                   I will go ahead and hear from you, Mr. Roller.

3                   MR. ROLLER: Thank you, Your Honor. I believe  
4 Mr. Desai has accurately described at least my understanding  
5 of how WeChat is used in China, but the critical issue that  
6 the Court needs to grapple with and that very little ink has  
7 been spilled over is that these accounts are not accounts  
8 that Momcozy has possession, custody, or control of under  
9 Rule 34.

10                  And under long-held Ninth Circuit law, the party seeking  
11 to obtain discovery bears the initial burden of proving that  
12 a particular responsive document or communication is within  
13 the possession, custody, or control of the person or entity  
14 to whom the request is made, and there has been no showing of  
15 that in this case. And the reason for that is, as Your Honor  
16 indicated, these are personal accounts. WeChat is used to  
17 make payments. It's used to share social media, memes,  
18 things that we in the United States might share on Twitter or  
19 Facebook. It's used to communicate, it's used as a texting  
20 platform, but it is tied to an individual's personal  
21 telephone number.

22                  Now, there is a WeChat enterprise version, for lack of a  
23 better term. I believe it's called WeCom. To my  
24 understanding -- and I'm quite new to the case -- but to my  
25 understanding, Momcozy does not use that enterprise version.

1      The closest that Momcozy uses, which is actually a lot more  
2      like what Elvie uses in the Slack channel -- and I think the  
3      case for Momcozy being entitled to Slack communications is  
4      drastically stronger than the case that Elvie is entitled to  
5      WeChat communications -- but the equivalent of that that  
6      Momcozy does use is an enterprise thing called Ding --  
7      D-I-N-G -- Talk. So that kind of platform which Momcozy uses  
8      is in the possession, custody, and control of Momcozy, and to  
9      the extent that there are responsive communications there,  
10     those would need to be produced subject to the concerns about  
11     the PIPL and so forth.

12       But, here, it is an unsupported assertion that Momcozy has  
13     possession, custody, or control of these individual  
14     employees' WeChat messages. You know, it's almost as if --  
15     you know, sometimes my kids communicate with me by the  
16     text-messaging feature of Instagram. I have no idea why, but  
17     let's say one of my law partners did that and my firm were to  
18     be sued, I think that we would first need to establish that  
19     the party to whom the request is directed actually has  
20     possession, custody, or control of that communication, and  
21     here, it simply does not.

22       And the Ninth Circuit case for the proposition that the  
23     party seeking to get a certain document needs to establish  
24     possession, custody, or control is *U.S. v. The International*  
25     *Union of Petroleum and Industrial Workers*. It's an old case,

1 870 F.2d 1450 at 1452. It's a Ninth Circuit case from '89  
2 and actually relies on cases from the '70s and before.  
3 Because Elvie has not established that Momcozy has  
4 possession, custody, or control of the employee WeChat  
5 accounts, there really isn't anything for the Court to do.

6 Now, Momcozy has asked those parties -- those employees to  
7 preserve those communications, just as we would hope that,  
8 you know, relevant Elvie employees wouldn't be deleting  
9 responsive text messages or even responsive Slack  
10 communications, even though the Slack communications actually  
11 belong to the entity, unlike those here.

12 I appreciate Mr. Desai's observations about working under  
13 the PIPL. Again, I think it's premature to get there,  
14 because they've not yet met the threshold standard of  
15 establishing possession, custody, or control, but there are  
16 some real issues there regarding consent. And even if  
17 consent is obtained, depending if the information is sought  
18 to be taken out of China, Momcozy may have to -- would have  
19 to seek the approval of competent authorities in China under  
20 Article 41 of the PIPL, and, you know, the penalty for  
21 violation of that can be criminal, so there are serious  
22 things that would need to be addressed.

23 Again, I appreciate Mr. Desai's statement about, you know,  
24 not wanting to get dinner plans and scrubbing information  
25 that could be potentially personal, but that is an issue we

1 would need to deal with. The good news is we certainly don't  
2 need to deal with it today, because the threshold question  
3 has not yet been met that the WeChat accounts are in the  
4 possession, custody, or control of my clients.

5 THE COURT: So what about the argument, though, that  
6 if you are doing business over your personal devices, you are  
7 bringing those devices within the ambit of discovery? I  
8 mean, we see that all the time where people are responding to  
9 work requests on Gmail or texting, and those items end up in  
10 discovery. Isn't that the same here?

11 MR. ROLLER: It could be the same, and I would also  
12 like to clarify that, you know, the 30 percent number was  
13 something that was thrown out that was on the basis of one  
14 new -- one employee, you know, who may have -- may have used  
15 it. It's not the group of people that's at issue here.

16 But I think that would first need to be established, and  
17 there are other discovery devices that are available to Elvie  
18 to determine that. And if that, then, is determined, then  
19 maybe they could meet the threshold of establishing that,  
20 just as, for example, we may meet the threshold that Elvie's  
21 text messages or social media posts or, you know, whatever  
22 English equivalent of WeChat that may be being used could be  
23 done, but we're not at that stage.

24 THE COURT: So, then, what's your position with  
25 respect to what gets you to that stage? Are you serving

1 requests for admission or interrogatories that ask how people  
2 communicate, or what's the threshold, then, that you believe  
3 needs to be met before we could engage in that analysis?

4 MR. ROLLER: Yeah, I think Elvie would need to take  
5 some discovery to determine how these communications are  
6 made, perhaps even, you know, something along the lines of  
7 what Mr. Desai is describing about the overlap between Slack  
8 and email communications. There may be some analysis in --  
9 you know, we'll produce the DingTalk records that have  
10 responsive information. There may be something that comes  
11 out of that where we can say, okay, these certain  
12 communications were handled on DingTalk, something else was  
13 handled on WeChat.

14 I'm entirely making that up. I do not know the facts.  
15 Elvie doesn't know the facts. But it's not something that  
16 can be decided now, because that threshold has not yet been  
17 met.

18 And even despite that, Momcozy has instructed the relevant  
19 employees to preserve the WeChat records, so they will be  
20 there if and when they're needed, if and when that threshold  
21 is met, but it hasn't been met yet.

22 THE COURT: So, for that reason, then -- because I  
23 understand it's Momcozy's position that threshold has not  
24 been met -- then, in your view, the Court doesn't need to  
25 look to the *Owens* or *Cadence* or *Phillips* cases that basically

1 say that the PIPL is not a big hurdle to discovery under the  
2 federal rules?

3 MR. ROLLER: Exactly. And I think, in those cases,  
4 that threshold had been met. That's the key difference.

5 I do think the *Cadence* case was wrongly decided and that  
6 that may be something that we need to discuss later on, but  
7 it's not something that we need to discuss today, because the  
8 Court can't get there because Elvie hasn't met the threshold  
9 showing that's required.

10 THE COURT: So, then, what's the status, just  
11 practically speaking, with respect to the remainder of the  
12 ESI order, right? Is this issue holding you up from getting  
13 through the rest of your ESI order? Because I don't want to  
14 end up in sort of a -- I don't even know what the right  
15 analogy is -- but some sort of chicken-egg issue where we  
16 don't engage in discovery because we don't have an ESI order,  
17 and yet, we can't agree on an ESI order because we have not  
18 engaged in sufficient discovery. Does that make sense?

19 MR. ROLLER: Yes. I'm the latest to this party, so I  
20 should probably defer to others, but my understanding is  
21 that, for the most part, the remainder of the ESI order has  
22 been resolved.

23 THE COURT: Okay. Maybe I'll return to Mr. Desai and  
24 let him comment on some of the things that you raised.

25 And also, just practically speaking, is this just a timing

1 issue? Do we need to table this issue before we take in some  
2 discovery?

3 Thank you, Mr. Roller.

4 MR. DESAI: I think that's accurate that this is the  
5 major sticking point. I think there's a red line of the  
6 agreement going back and forth between the parties, and so I  
7 can't say specifically whether there's agreement on  
8 everything else, but I can say that this seems to be the main  
9 issue.

10 If I could, I'll just address a couple of things that  
11 Mr. Roller raised. One is that, you know, if it is the case  
12 that -- as Your Honor sort of alluded to, if it is the case  
13 that your business executives and high-ranking employees of a  
14 company can use their personal device for 30 percent of their  
15 business communications and that somehow creates a shield to  
16 discovery because of possession, custody, or control, I mean,  
17 that becomes a pretty big loophole in e-discovery, the idea  
18 that we haven't established possession or custody or control.  
19 I mean, if they are executives and employees of the company  
20 and they are conducting 30 percent of their business  
21 communications over their personal devices, and, as  
22 Mr. Roller is pointing out, the company is able to direct  
23 them to preserve their messages, I'm not sure what else we  
24 have to show to determine that their messages are in  
25 Momcozy's possession, custody, and control.

1        "Possession" is construed broadly, and to the extent these  
2 are employees and executives of named plaintiffs and  
3 defendants who are using their personal -- who are choosing  
4 to use their personal device as a business communication  
5 platform, they absolutely -- those messages are absolutely in  
6 the possession, custody, or control of the company,  
7 particularly when they can direct them to preserve them.

8            MR. ROLLER: If I may, Your Honor, to the extent I  
9 used the word "direct," that was a mistake, and I'm not  
10 certain whether I said that. What I should have said is  
11 Momcozy has asked and the employees have agreed to preserve  
12 those materials. So I understand Mr. Desai's point, but I  
13 don't think it's well-taken here.

14           Again, I apologize to the Court and counsel on the phone.  
15 I was not part of this litigation when the 30-percent comment  
16 was made, but my understanding is that was based off of one  
17 employee. It was a young employee, very new to the company,  
18 and I don't think that should be taken as the gold standard.

19           Some discovery needs to be taken about how communications  
20 are done and whether WeChat would potentially have a lot of  
21 responsive information or if, as Mr. Desai has said, it's  
22 likely to be duplicative of the email communications or the  
23 DingTalk communications, just as Mr. Desai has said their  
24 Slack channel is duplicative of their emails.

25           THE COURT: So I don't think the 30 percent -- I

1 mean, that's -- I understand. I appreciate that  
2 clarification, Mr. Roller, with respect to the quantity of  
3 the emails, but I think you could agree, though, that if any  
4 level of business is being conducted over WeChat, there may  
5 be discoverable information in those communications. I'm  
6 assuming Momcozy has issued a litigation hold or something to  
7 that effect asking parties not to delete otherwise  
8 discoverable information or relevant and potentially relevant  
9 information.

10 Mr. Desai, what's your response with respect to timing?  
11 Like, what's the downside in issuing some discovery to lay  
12 this foundation and explore the question of the scope of  
13 additional electronic communications, as needed?

14 I'm a little reluctant to say, well, it would be  
15 burdensome or disproportionate to search the WeChat channels  
16 when we don't have any sense of what volume we're talking  
17 about. You know, everything is disproportionate and  
18 burdensome if you haven't looked at it yet, so I'm  
19 disinclined to say, well, this WeChat should be off the table  
20 altogether, particularly in light of other decisions and just  
21 the common-sense reality that we face with electronic  
22 communications and the intertwining issues that we encounter  
23 with our personal devices and accounts.

24 So I don't think the threshold is very high, but I'm  
25 curious to know, if the parties can reach agreement without

1 the Court having to issue an order, that's always preferable  
2 in terms of resolving these issues, especially these early  
3 stages in the litigation.

4 So is there -- and this question is for both of you -- a  
5 timing and discovery solution here that could lay a threshold  
6 that would inform the parties -- or lay a foundation that  
7 would inform the parties in how to reach agreement on these  
8 final issues in the ESI order?

9 MR. DESAI: So, from our perspective, I think I have  
10 two points on that. One is that I feel like, you know, sort  
11 of establishing -- or putting the burden on Elvie to  
12 determine that, what is unquestionably a source of ESI that  
13 has relevant business communications, is within the scope of  
14 ESI, electronically-stored information, of Momcozy, so is  
15 kind of the opposite.

16 Really, we've already talked about business communications  
17 occurring on this platform. That is electronically-stored  
18 information. If there's a reason that information should not  
19 be collected from that source, the burden should be on  
20 Momcozy to file a protective order explaining why it should  
21 not be collected. And I think the model ESI agreement  
22 actually alludes to that, because it talks about the parties  
23 exchanging sources of additional information, you know, like  
24 phones and things like that.

25 So I feel like it's sort of -- I don't know, is "cart

1 before the horse" the right analogy? I'm not sure, but it's  
2 flipping things around.

3 But the other issue on your timing question, Your Honor,  
4 is that we have served quite a bit of discovery in this case  
5 already, and we have not gotten answers. We have not had any  
6 documents produced to us. We have not really had any  
7 meaningful answers to our interrogatories that are  
8 outstanding.

9 And so we have a concern that this case is not -- that  
10 we're not able to move this case along as quickly as we would  
11 like, and so that's the reason why we were hoping to  
12 short-circuit this by coming to an agreement with Momcozy,  
13 and when that wasn't possible, we sought guidance from the  
14 Court.

15 THE COURT: That makes sense. And you answered my  
16 question, which was -- I guess I could have asked it more  
17 directly, but is there discovery outstanding already? So you  
18 are already in discovery.

19 MR. DESAI: We are.

20 THE COURT: Presumably, have you asked for discovery  
21 that implicates these WeChat messages, or is this discussion  
22 in the ESI context sort of in a vacuum?

23 MR. DESAI: I can't say for sure whether we -- I know  
24 we have something like 65 RFPs out, something like 20  
25 interrogatories out, but I can't say for sure whether there's

1 one on this issue particularly. Really, this issue has come  
2 up in the context of negotiating the ESI agreement, and so I  
3 guess, yeah, you know, it's likely that maybe this has been  
4 coven to this negotiation, this discussion.

5 THE COURT: Okay. Mr. Roller, do you have any  
6 response to that? It seems as though, if discovery has been  
7 produced and there are sources of information that are likely  
8 to lead to the discovery of admissible evidence, you know, in  
9 the normal course, these would be included, right? These  
10 would be included within the ambit of discovery if people are  
11 doing business on their personal devices or accounts. Tell  
12 me why you shouldn't have to move for a protective order to  
13 avoid having to search these accounts.

14 MR. ROLLER: Because I don't -- I mean, do some  
15 communications happen over WeChat? Probably, just like some  
16 communications happen in every business over text. We're  
17 not -- we're not asking that they search their employees'  
18 texts. Maybe we should do that. Maybe -- you know, we're  
19 not even asking that Slack be searched at this point. Maybe  
20 we should do that.

21 We're taking the approach that, let's get the core  
22 discovery out. If there is a -- if it is shown that there  
23 are materials that would only have been shared through  
24 WeChat, through discovery devices, then we can circle back to  
25 that issue, but that has not yet been established.

1       I don't believe there are any RFPs that go directly to  
2 WeChat messages. I'm not going to tell the Court or counsel  
3 that there's nothing in WeChat that would be responsive -- I  
4 don't know -- but I don't believe they've met that threshold  
5 to establish that these WeChat accounts are in Momcozy's  
6 possession, custody, or control, just as we have not yet met  
7 the threshold that their employees' text messages or  
8 Instagram accounts or, you know, whatever instant-messaging  
9 features they're using are within their custody or control  
10 yet.

11       As to the status of discovery, my understanding is that a  
12 chunk of responsive documents will go out next week and that  
13 we anticipate the bulk of the remaining documents that are  
14 responsive and that we've agreed to produce will go out  
15 within a month.

16           THE COURT: Okay. Well, I'm heartened to hear that  
17 this process has not held you up in terms of proceeding with  
18 discovery on other issues on which there is agreement.

19           So here's what I'm going to do: I don't want to rule on  
20 discovery requests in a vacuum that I haven't seen, but I  
21 will tell you that I am inclined to grant Elvie's request to  
22 have these accounts be subject to discovery.

23           It sounds like there is at least some concern and some  
24 substantiated allegation that there is some level of business  
25 that's being conducted that would at least require a

1 good-faith search in the normal course.

2 I would encourage the parties to try and keep working on  
3 this issue, if you can. However, I think, procedurally, I'm  
4 not going to make you come back again, you know, for another  
5 informal conference, but I did want to give you the benefit  
6 of my thinking.

7 And then, procedurally, what I think needs to happen is,  
8 Mr. Roller, if you look at the discovery requests and  
9 believe -- and I understand you're new to the case, so I'm  
10 not asking you to recite them -- but if you look at them and  
11 believe, based on the Court's opinion that these messages are  
12 likely implicated, that a protective order is necessary  
13 because they are burdensome or because they are truly not  
14 within the custody and control of Momcozy, or on the face of  
15 those requests that are currently outstanding, that they have  
16 not met their burden, then you can certainly file that  
17 motion, and the Court will entertain that motion and then can  
18 rule on it with a full record, the requests and any authority  
19 you want to cite. So you'll have the opportunity to do that.

20 I do think, because discovery has been issued, that that's  
21 the posture we're now in. If you believe that, on the face  
22 of that discovery, that Elvie has not met their burden with  
23 respect to establishing that those accounts are discoverable,  
24 then you can certainly move for that protective order and  
25 bring that to the Court's attention for a more fulsome

1 discussion, and then that is where the Court would look at  
2 the concerns that at least have been alluded to under the  
3 PIPL.

4 Does that make sense?

5 MR. ROLLER: Yes, Your Honor.

6 THE COURT: In the interim, if the parties are able  
7 to reach an agreement in light of this discussion, obviously,  
8 that's the preferred outcome, but I'm not going to prohibit  
9 anybody from filing a motion that enables the Court to have a  
10 more thorough opportunity to look at the actual discovery  
11 requests to the extent you believe the burden has not been  
12 met.

13 Mr. Desai, do you have any comments? You looked like you  
14 were going to say something.

15 MR. DESAI: No, Your Honor, that's clear.

16 THE COURT: Okay. Mr. Roller, any final thoughts?

17 MR. ROLLER: No. It is clear.

18 One thing that we were interested in raising and previewed  
19 in our response brief on the motion to amend is,  
20 particularly, if the motion to amend is granted, Momcozy  
21 believes a significant extension of the case schedule is  
22 going to be necessary. Rather than, you know, rush to file a  
23 cross-motion that may not be necessary, we thought it might  
24 make sense, while all the parties are here, just to raise  
25 that and ask, if that motion to amend is granted -- and

1 candidly, the basis upon which Momcozy opposes it is the  
2 prejudice based on the enlargement of the case, which could  
3 be remedied by an extension.

4 We just wonder how the Court would like that issue to be  
5 presented. Should it be presented in a contested motion?  
6 Should the parties confer and do something equivalent to an  
7 LCR 37 expedited motion that sets forth their positions?  
8 Just trying to think about the most efficient use of the  
9 Court's and the parties' time.

10 THE COURT: I appreciate that very much. So I guess  
11 you're asking if the parties disagree with respect to  
12 extending the case schedule? Is that -- or are you asking  
13 now -- and I have not -- the motion was ripe as of, like, an  
14 hour ago, so I have no comment on the motion yet.

15 But are you asking, Mr. Roller, if the Court grants the  
16 motion, then how to address the enlargement of the case  
17 schedule, or are you saying, let's talk about enlarging the  
18 case schedule right now because that may relieve or resolve  
19 your opposition to the motion itself?

20 MR. ROLLER: I think the latter is true, but the  
21 former is what I was asking, in that if the motion to amend  
22 is going to be granted, given that the basis of our  
23 opposition would be prejudice arising from the enlargement of  
24 the case, we were wondering if the Court would prefer --  
25 because the parties have discussed an enlargement, and Elvie

1 has indicated some appetite for an extreme modest extension,  
2 but not the type of extension we believe would be necessary.  
3 How would the Court prefer that issue be presented, in a  
4 contested motion or in something akin to what we're doing  
5 here or the LCR expedited procedure, which, again, is  
6 typically for discovery disputes --

7 THE COURT: Sure.

8 MR. ROLLER: -- but, for something like this, may  
9 make sense.

10 THE COURT: I mean, ideally, the parties could agree  
11 on an extension of the case schedule, of course. That's  
12 always the ideal. And, please, if the parties do agree on  
13 that such that it resolves your opposition to the motion to  
14 amend, please just do let chambers know. You can email  
15 Ms. Staples and let her know. At this point, if the parties  
16 have agreed to an extension of the case schedule of a certain  
17 length -- and I understand that you have not yet -- but if  
18 you are able to, then let us know, and then we can issue a  
19 new case schedule.

20 To the extent as to how to let the Court know if you have  
21 disagreements on what any extension of the case schedule  
22 would look like, then I would say just filing a contested  
23 motion would be the easiest way to bring that before the  
24 Court. And if there's some reason that needs to be  
25 expedited, you need to let us know in the papers for sure.

1 MR. ROLLER: Thank you.

2 THE COURT: All right.

3 MR. DESAI: And I guess I have a follow-up question  
4 on that, Your Honor, because it seems like the opposition to  
5 our motion for leave to amend is sort of premised on this  
6 idea that there is prejudice -- there would be prejudice to  
7 Momcozy if the case is not enlarged. If that's the only  
8 basis for objecting to the motion for leave and we're  
9 separately going to address the dispute we have about the  
10 current case schedule, you know, my view is that maybe we  
11 can -- you know, we're interested in getting the motion for  
12 leave sorted out so that we know the appropriate scope of the  
13 case. So that's one point.

14 The other thing is, on this issue on prejudice from the  
15 enlargement of the case, you know, I didn't appreciate that  
16 that is the argument here, that Momcozy was not aware of the  
17 potential scope of the case when we negotiated the original  
18 schedule, but they absolutely were. We have been transparent  
19 that we intended to add additional patents when they issued  
20 from the Patent Office. We've been transparent that we were  
21 planning to add products, and we had informed Momcozy of that  
22 at the time we were negotiating the original schedule.

23 So, at that time, if they believed that there was some  
24 prejudice with respect to the schedule that we negotiated, at  
25 that time, they should have said that, "Well, actually,

1 instead of, you know, a 900-day schedule, we need a 1,200-day  
2 schedule." You know, we didn't catch them by surprise with  
3 this. We have been completely transparent, so the prejudice  
4 argument, I think, as the reason for enlarging the case is  
5 misplaced.

6 THE COURT: Okay. Well, I appreciate that, and like  
7 I said, the Court has not seen the motion to amend yet. It  
8 just became ripe today, so I can take up that issue at the  
9 appropriate time. My comment was more, if it's the timing  
10 that is the holdup on the motion to amend and the parties are  
11 able to agree to a timing that works to alleviate that  
12 pressure, then let us know that.

13 MR. DESAI: Right.

14 THE COURT: And we can issue a schedule accordingly.  
15 Otherwise, you know, we'll rule on the motion to amend in the  
16 due course and then address any schedule adjustments that the  
17 parties bring to our attention. Okay?

18 Have we addressed all the issues we need to get through  
19 today?

20 MR. DESAI: Yes, I think that's it.

21 MR. ROLLER: Yes.

22 THE COURT: Thank you. We'll be in recess.

23 MR. JACOBS: Thank you.

24 MR. YANG: Thank you.

25 (Adjourned.)

## C E R T I F I C A T E

I, Sheri L. Schelbert, RMR, CRR, do certify that the foregoing is a correct transcript, to the best of my ability, from the record of proceedings in the above-entitled matter.

/s/ Sheri Schelbert

## Sheri Schelbert